***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

# 75-1031

In The

## United States Court of Appeals

For The Second Circuit

THE UNITED STATES,

*Plaintiff-Appellee,*

ORIGINAL

- against -

SAMUEL WEISMAN,

*Defendant-Appellant.*

*On Appeal from a Judgment of the United States District Court for the Southern District of New York*

# BRIEF FOR APPELLANT


SHEA GOULD CLIMENKO KRAMER & CASEY
*Attorneys for Defendant-Appellant*
330 Madison Avenue
New York, New York 10017
661-3200

MILTON S. GOULD
DANIEL L. CARROLL
*Of Counsel*



(8157) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N. J. (201) 257-6850 | New York, N. Y. (212) 565-6377 | Philadelphia, Pa. (215) 563-5587 | Washington, D. C. (202) 783-7[illegible]

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Cases:

Cases: Page



Other:

Other:

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

---

Docket No. 75-1031

---

UNITED STATES OF AMERICA,

Appellee,

- against -

SAMUEL WEISMAN,

Defendant-Appellant.

---

# DEFENDANT-APPELLANT'S BRIEF

---

## PRELIMINARY STATEMENT

After a seven-day jury trial, defendant Samuel Weisman was convicted for conspiracy to violate and violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder and acquitted on two counts of mail fraud. The co-defendant, Harold

Lassoff, was acquitted on all open counts pending against him. The trial of defendants Weisman and Lassoff had been severed from the action entitled United States v. Koss, et al. in which the indictment named 16 defendants. At the trial of the main action in April and May of 1974, four of the named defendants were found guilty of offenses relating to the sale of stock in Automated Information Systems, Inc. ("AIS"). Those convictions were affirmed by this court in United States of America v. Koss, 506 F 2d 1103 (2nd Cir., 1974).

On January 7, 1975* a judgment of conviction was entered against the appellant herein which directed the payment of a fine of $5,000. (414a)**

## ISSUES PRESENTED FOR REVIEW

1. Where, over objection, evidence as to prior associations or transactions between the defendant and the government's main witness was admitted as so-called prior similar acts, did the trial court properly refuse to give any jury instructions on

---

* On January 20, 1975 the January 7, 1975 judgment was amended to eliminate reference therein to Counts 6 and 7, the mail fraud counts on which the defendant was acquitted. (415a)

** References are to pages of the Appendix.

the limited purpose for which such evidence was admitted?

2. Under the facts of the instant case, was it reversible error to admit evidence of prior similar acts between the defendant and the government's main witness on the government's direct case?

3. Did the trial court error in refusing to dismiss the third count of the indictment charging a violation of Section 10(b) of the Securities Exchange Act of 1934 where the only proof offered by the government of the use of a means or instrumentality of interstate commerce or the mails was an intrastate telephone call?

4. Does the action of the government, during the course of the trial, as outlined at pages 45-55, infra, warrant the granting of a new trial.

## SUMMARY OF THE INDICTMENT

Samuel Weisman was charged, in nine counts of the thirteen count indictment, with conspiracy (Count 1), violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder (Count 3), and mail fraud (Counts 5-11). By the time of trial, the charges against Mr. Weisman were narrowed to four counts,

the government having elected not to go to trial on five of the seven mail fraud counts.

The indictment charged a broad and far reaching conspiracy to manipulate and the manipulation of the stock of Automated Information Systems, Inc. beginning in November of 1970. In one of the 14 "means of the conspiracy" detailed in paragraph 21 of the indictment it was alleged that in May of 1971 Messrs. Weisman and Lassoff met and agreed with co-conspirator Michael Hellerman that Weisman would purchase AIS stock through Lassoff, Weisman's registered representative. (22a) Also, paragraph 24 of the indictment which detailed fifteen "overt acts", charged that: "[i]n or about May 3, 1971, defendant, Samuel Weisman, had a conversation." (23a)

As discussed in more detail below, the charges against defendant Weisman centered around certain events which took place during a two-week period in May of 1971. These events were (1) the purchase by Weisman of 3,000 shares of AIS stock on May 3, 1971 through his broker, Harold Lassoff; (2) the purchase by Martin Cohen, one of Lassoff's customers, of 3,000 shares of AIS on May 4th; (3) the so-called breadkfast meeting at Hellerman's home on May 16, 1971 and (4) a visit by Weisman and Lassoff to Cohen's home later that same day.

## THE EVIDENCE

### WEISMAN'S BACKGROUND

Mr. Weisman, who is 74 years of age, has been a lawyer in New York City for over 50 years. (204a) He is a former member of the New York State Legislature (204a) and is presently the president of the Hebrew Home for the Aged, Bronx Division (205a) His record and reputation, prior to the filing of the indictment herein, was unblemished as evidenced by the various character witnesses who testified on his behalf, including the District Attorney of Bronx County two Justices of the New York Supreme Court, a Civil Court judge, the former Bronx County Surrogate and a bank president. He recently received an award from the Bronx County Bar Association for 50 years of distinguished service. (250a-51a) Mr. Weisman's practice, however, did not involve the securities laws and he frankly admitted at the trial that he had never had anything to do with securities in the course of his practice. (207a)

### HELLERMAN'S BACKGROUND

Weisman's chief accuser at the trial was one Michael Hellerman who has been characterized by this court as "an untiring securities con-artist" (U.S. v. Koss, 506 F 2d at 1111). Mr. Hellerman's participation in numerous stock swindles and numerous other illegal activities as well as his written agreement with the United States Government in which the government agreed not to prose-

cute him for his numerous crimes in return for his testimony, is described in detail in this court's opinion in its decision in United States v. Koss, (506 F 2d at 1111-13) and will not be detailed herein.

WEISMAN'S ASSOCIATION WITH THE HELLERMAN FAMILY

It may be helpful, however, to outline in general terms how Weisman came to know Hellerman in view of their diametrically opposed life-styles. Hellerman's father, Louis Hellerman, prior to his death in 1968 was a vice president of Sterling National Bank and, through Louis Hellerman, defendant Weisman had known the Hellerman family for over forty years. (207a-8a) In addition to being his lawyer on a number of matters, Weisman was a close personal friend of Louis Hellerman and, thus, knew Michael Hellerman from the date of his birth. (209a) Upon Louis Hellerman's death, Weisman was retained by Mrs. Hellerman to handle Louis Hellerman's estate. (208a-9a)

WEISMAN'S FIRST LAWSUIT AGAINST HELLERMAN

At the time of his death, Louis Hellerman and Michael Hellerman owed Weisman a substantial amount of

money. When Weisman was unable to collect from either the estate or from Mrs. Hellerman, who collected $210,000 in life insurance upon the death of her husband, he was forced to commence an action against Michael Hellerman. (213a-16a) This action culminated in a judgment against Hellerman in the amount of approximately $130,000. (225a) Subsequently, Weisman agreed to a settlement of $73,000 on the judgment (225a-26a), said amount to be paid in monthly installments of $1,100 over a six-year period. (227a) This settlement was reached on March 30, 1971. (227a)

WEISMAN'S PURCHASE OF AIS STOCK

On May 3, 1971, approximately one month after the settlement, Weisman, on Hellerman's recommendation, purchased 3,000 shares of AIS stock for approximately $4.50 per share. (243a) According to Weisman's testimony, Hellerman told him that he had investigated the company and that he had so much confidence in it that he was willing to put up 50 percent of the purchase price and, if Weisman lost any money on the stock, he would take the loss to the extent of 50% of the purchase price. Profits were to be split 50-50. (239a) The next day Hellerman's brother-in-law delivered to Weisman 50% of the purchase

price or approximately $6,900 which Weisman put into his safe-deposit box. (247a)

Mr. Weisman held his AIS stock until December of 1972 when he sold it for $.02 a share. (295a-96a) His loss was, therefore, almost $14,000, Hellerman having, in the fall of 1971, flim-flammed him out of the $6,900 previously given to him at the time he purchased the AIS stock in May of 1971. (269a-83a)

WEISMAN'S SECOND LAWSUIT AGAINST HELLERMAN

At about the time that Hellerman conned Weisman into returning the $6,900, he also defaulted on the monthly payments due Weisman under the March 31, 1971 settlement agreement referred to above. (284a) Weisman, therefore, was forced to commence another action against Hellerman and others in an attempt to collect the amounts due. (283a-84a) Weisman also filed a written complaint with the New York County District Attorney's office in which he detailed circumstances surrounding his purchase of the AIS stock, including his agreement with Hellerman in this regard as outlined above, as well as the facts surrounding Hellerman's conning him into returning the $6,900. (283a, 285a-86a, Def. Ex. Q)

Following the delivery of the complaint to the district attorney's office Weisman, at the request of Hellerman's attorney, attended a settlement meeting with

Hellerman. Present were Weisman, his attorney, Hellerman, his attorney and Mrs. Hellerman. (292a-93a) Hellerman, however, refused to talk settlement. Instead, he began to rant and rave, finally threatening Weisman: "I'll dance at your funeral and I'll piss on your grave." (294a) Shortly after that meeting, Mrs. Hellerman called Weisman to apologize for her son's behavior and a settlement was thereafter worked out calling for Mrs. Hellerman to pay the amount provided for in the settlement upon Weisman withdrawing the complaint filed in the district attorney's office. (295a)

Following the above described meeting, Weisman was subpoenaed to appear before the grand jury with respect to the AIS matter and on three occasions so appeared and answered all questions put to him. (249a-50a)*

---

* It appears from the evidence adduced at trial that defendant Weisman was actually responsible for the initiation of an investigation by the SEC with respect to AIS. Thus on May 7, 1971 Lassoff had a call in which Erwin Layne attempted to place an order for 10,000 shares of AIS stock. (106a, 182a) Layne, who is also a defendant in this case was a confederate of Hellerman had called Lassoff at Hellerman's behest. (106a) Lassoff in turn called Weisman first to find out if Weisman knew Layne and, when Weisman told him he didn't, to seek Weisman's advice as to whether he should take the order. Weisman told Lassoff that if he had any doubts he should discuss the order with his firm. (257a) According to Harold Frohlich, the then executive vice president of Pressman, Frohlich & Frost, Lassoff's employer, Lassoff went to Frohlich and informed him of the Layne order stating that Layne had been recommended to him by Hellerman. (182a) Frohlich then called Weisman in order to inquire about the circumstances surrounding Weisman's purchase of his AIS stock and Weisman candidly stated to Frohlich that he had purchased the stock on Hellerman's recommendation. (185a, 189a) Frohlich recognized Hellerman's name, told Lassoff not to take the Layne order (182a) and called his attorneys and told them to contact the SEC. (187a, 195a) The lawyers then went to see the SEC with respect to the AIS stock on May 11, 1971 (196a) thus precipitating the SEC's investigation into the AIS manipulation scheme.

## WEISMAN'S ALLEGED KNOWLEDGE OF THE AIS MANIPULATION SCHEME

Despite the broad and wide reaching conspiracy charged, ranging in time from "on or about the first day of November, 1970 and continuously thereafter, up to and including the date of the filing" of the indictment, (17a) the proof presented by the government at trial showed that Mr. Weisman's entire alleged involvement in this conspiracy took place during an approximately two-week period from May 3, 1971 through May 16, 1971. Indeed, when all the evidence was in, the entire case against Weisman centered upon one crucial fact—did he know on May 3, 1971, when he purchased 3,000 shares of AIS on the recommendation of Michael Hellerman, that Hellerman and others were engaged in a scheme to manipulate the price of AIS stock?

On this crucial issue of knowledge, and therefore criminal intent on the part of Weisman when he purchased the 3,000 shares of AIS, Hellerman testified that when he called Weisman on May 3, 1971 he told him directly that he was manipulating the price of AIS. Thus, Hellerman testified:

> "Q ...Directing your attention sir to May 3rd, 1971, did you have a conversation with Mr. Weisman on that day?

"A Yes, I did, sir.

"Q Would you describe that conversation Mr. Hellerman? Was it in person or over the telephone?

"A Telephone, sir.

* * *

"Q And what was that conversation as best you can recall it?

"A I called Sam and...I said, 'Sam... would you care to make some money?'

He said, 'What do you have now?'

[Objection as to certain testimony was sustained.]

"THE COURT: ...What did you say in words to Mr. Weisman?

"THE WITNESS: I told Mr. Weisman— I said, 'You know, if I'm putting up half the cash that I got the box in stock, Sam, and I am taking the stock to $20, we'll make a lot of money. But it's going to be a 60, 90-day deal, but whatever amount of shares you buy I'll give you half the cash. Now, if the stock drops 25 per cent, you have a right to sell out all the stock and you keep the proceeds, if it should drop, to make yourself whole with the cash that I gave you or will give you and the proceeds you will get from selling out the stock. You make yourself whole first and then give me back whatever is left over for myself if the stock should drop 25 per cent. So this way you can't lose.

"And he said, 'Fine. How many shares should I buy?'

"So I said, "Buy as many as you can afford to buy.'

"So we agreed on 3,000 shares."
(57a-60a)*

Assuming that Weisman knew what Hellerman meant by "the box" (a term which Weisman denied ever hearing until Hellerman used it at the trial [234a]), there was evidence of Weisman's knowledge of the manipulation and thus his intent at the time he purchased the AIS shares. At that juncture, it would have been solely a matter of whether the jury believed Hellerman's testimony. As discussed in more detail below, the jury verdict, acquitting defendant Harold Lassoff, demonstrates that the jury did not find Hellerman completely credible.

WEISMAN'S PRIOR DEALINGS WITH HELLERMAN

The government, however, apparently not completely confident of Hellerman's credibility in the eyes of the jury, proceeded to elicit from Hellerman evidence of prior deals or manipulation schemes which Hellerman testified Weisman either participated in or knew about.** Indeed, Hellerman's testimony as outlined above was prefaced by

---

* The testimony quoted above has been edited so as to delete any references by Hellerman to prior transactions with Weisman. Such testimony is discussed in detail below.

** Although Weisman admitted that he had in fact purchased stock on Hellerman's recommendation he denied ever knowing that Hellerman was invovled in schemes to manipulate those stock. (234a-237a)

the following statement about such prior deals:

> "I told Mr. Weisman that 'This is different than the Tabby's deal, it is different than the Imperial deal, it's different than the Belmont deal.'
>
> "I explained to him that in those deals I guaranteed, or specifically in Tabby's* I guaranteed his losses against half the profit. In this deal I would put up half the cash." (59a)

The following testimony was then elicited with respect to a stock called Tabby's which Weisman had purchased on Hellerman's recommendation two years earlier:

> "Q Mr. Hellerman, I want to take you back now to 1969 and ask you whether or not you had a conversation with Mr. Weisman at that time in his office concerning Tabby's stock at that time?
>
> "A Yes, sir.
>
> [Objection overruled.]
>
> "Q Mr. Hellerman, approximately when did this conversation occur?
>
> "A A week or so before the offering of Tabby's International, which was stock offering that J.M. Kelsey was underwriting and I was the hidden owner of J. M. Kelsey.
>
> "MR. GOULD: If your Honor pleases, if we are going to get a conversation, let's get the conversation.
>
> "THE COURT: Right, give us the conversation. What did he say to you and what did

---

* Hellerman admitted that he did not know whether Weisman ever purchased the Belmont or Imperial stock. (84a-86a, 90a-91a) Weisman denied ever purchasing Belmont stock but did testify that he purchased 500 shares of Imperial stock independent of Hellerman. (234a-237a)

you say to him?

"A I told Mr. Weisman that we're coming out with a new issue at $2. It would be a very quick deal and I would take him out of the stock, about $3.50 or $4. I explained to him the stock had to go up because we had the box again and we had to retail, take the people out of the stock. It was all set up the whole deal.

I guarantee the losses, Sam, but instead of giving you half the profit, you can keep half of the profit I am going to make and apply it towards what I owe you for the Reno deal." (61a-63a)

The following day, the above testimony was repeated and elaborated upon:

"Q Mr. Hellerman, yesterday at the time that we recessed, I asked you a question concerning Tabby's stock.

"A Yes, sir.

"Q We broke off in the middle of that series of questions. Could you tell us, sir, directing your attention to the fall of 1969, what conversations you had with Mr. Weisman concerning Tabby's?

[Objection overruled.]

"A About a week or two before the offering of Tabby's, when J. M. Kelsey was going to underwrite Tabby's I went to Mr. Weisman's office and I told Mr. Weisman that I was coming out with a new issue called Tabby's International, it was going to be a very short deal, I would guarantee his loss and I would want 50 per cent of the profit, and I

told him that he didn't have to give me the profit in cash or check, he could apply it to the money I owed him from the Reno deal* we had.

I told Mr. Weisman that the stock was coming out at $2, he would have to hold it—it would be a short deal, but he couldn't go to anybody else and sell the stock, because I didn't want to break the box, I would take him out, I put him in and I would take him out, and I would get anywhere between 3-1/2 and $4 for the stock, and Mr. Weisman said, 'Okay, how many shares should I get?'

I said, 'Sam, whatever you want.'

He called in Herbert, his son, and he said, 'Mike's got a good deal. How many shares do you want?'

And Herbert said, 'I'll think about it.'

And Sam said should I get some for his other son-in-law and other members of his family and he said, 'Could I put my secretary in, could I get my secretary some stock?'

So I said, 'Sam, anybody you want, because I want to try to make up to you the money I owe you from the Reno deal,' and I said, 'When you make the profit on this deal, Sam, there will be a lot of deals like this, and maybe I can pay you back the money I owe you from the Reno deal with my end of the profit that I would make on the deal.'

And Sam said, 'Let's see what happens in this deal and then we'll discuss it.'

"Q Do you know the name of Mr. Weisman's secretary at that time?

---

* Although Hellerman attempted to give the impression that there was something sinister about the so-called "Reno Deal", it developed that this "deal" merely involved a proposed purchase by Hellerman and others in 1961 of land in Reno, Nevada. (217a-18a)

"A Miss Marver." (76a-78a)

After putting into evidence documents of J. M. Kelsey showing purchases of Tabby's not only by Weisman but also by his son and his secretary, the government then elicited from Hellerman testimony with respect to two other stocks, Imperial Investment and Belmont Franchising. The thrust of this testimony was that, although he did not know if Weisman purchased those stocks, Hellerman had informed Weisman about schemes to manipulate the price of those stocks. With respect to Imperial Investment, Hellerman testified as follows:

> "Q Mr. Hellerman, at or about the same time, that is, directing your attention to the fall of 1969, did you have a conversation with Mr. Weisman concerning the stock of Imperial Investment Corporation?
>
> "A Yes, sir, I did.
>
> "Q Did you have more than one conversation or just one conversation?
>
> "A More than one conversation, sir.
>
> "Q Take each conversation in series and tell us who was present and where the conversation occurred, and limit yourself just to the words spoken if you can.
>
> "MR. GOULD: Your Honor, may I have a particular objection to conversations with respect to this other security?
>
> "THE COURT: Yes. Same ruling.

"A The first conversation, Tabby's—Imperial was about $4, $5 a share.

"MR. GOULD: If your Honor please, I object to this and move to strike it out.

"Can't we get a response from this man?

"THE COURT: You just answer the question, please. What did you say to him and what did he say to you?

"A I told Mr. Weisman in his office, I told Sam that I thought Imperial was a good buy, that I thought the stock was going to move up considerably, that I was starting to pay off a few brokers to buy the stock. I just told him.

Sam didn't say he was going to buy any stock or that he would buy any stock.

"THE COURT: No. Just what did you say, what did he say, the words that were used.

"THE WITNESS: He didn't say anything. 'Thank you for telling me,' and that was it.

"THE COURT: All right.

"Q Did you have another conversation with Mr. Weisman following the first?

"A Yes, sir.

"Q Approximately how long after the first conversation did you have the second conversation?

"A A short time, a couple of weeks.

"Q Where was that conversation?

"A In Mr. Weisman's office.

"Q What did you say and what did Mr.

Weisman say?

"A I told Mr. Weisman that I had made a deal with Murray Taylor, a man by the name of Murray Taylor, and that he was going to put a lot of buying into the stock. I don't know if he had bought any Imperial or he was going to buy --

"Q Mr. Hellerman --

"A I told this to Sam. This is what I told Mr. Weisman. 'I don't know if you bought any stock or you didn't buy any stock, but if you didn't, the stock is going to move and I am just telling you like a friend to buy the stock,' and he thanked me again. He didn't tell me if he bought any or if he didn't."* (84a-86a)

Concerning the Belmont stock, Hellerman testified as follows:

"Q Directing your attention to the spring of 1970, did you have a conversation with Mr. Sam Weisman in the spring of 1970 concerning Belmont Franchising Corporation?

"A Yes, I did, sir.

"MR. GOULD: Same objection, your Honor, a continuing objection on it.

"THE COURT: Same ruling.

"MR. HAWKE: I also object. I think it's subject to your Honor's ruling that it's not against the defendant Lassoff.

---

* Testimony about alleged third conversations between Weisman and Hellerman concerning Imperial was stricken by the Court. (86a-89a)

"THE COURT: Both of you are getting a little free here, but I gather that the testimony will come in soley against the defendant Weism n.

"The jury will limit such testimony solely to the defendant Weisman. It does not apply to the defendant Lassoff.

"If as we go along you have a specific objection, Mr. Gould, such as this last one you made, you may get up and repeat it. Otherwise the ruling is the same.

"MR. GOULD: Thank you, your Honor.

"Q Mr. Hellerman, would you tell us now, directing your attention to the spring of 1970, of the conversation you had with Mr. Weisman concerning Belmont Franchising Corporation --

"A Yes.

"Q -- first of all, where did the conversation occur and who was present?

"A In Mr. Weisman's office and Mr. Weisman and I were there.

"Q What was the conversation?

"A I told Mr. Weisman that I was taking over the box in Belmont Franchising and would he like to get in the deal. I told Mr. Weisman that we were taking over the box at $15 a share. It was not a new issue. I was buying the box in the Street from somebody that had it and would he like to get into the deal.

Mr. Weisman said no, that he wasn't interested in getting into the deal. Mr. Weisman said to me, 'We have too many problems straightening out the money you owe me from Reno and I don't want to do anything until that's straightened out.'

And I don't know if he ever bought the stock or he didn't buy the stock." (90a-91a)

The evidence as to Weisman's knowledge of Hellerman's prior illegal deals, presumably offered in anticipation of a denial by Weisman that he knew about the manipulation scheme with respect to AIS, was not even limited to so-called prior similar transactions. For example, Hellerman was permitted to testify that he informed Weisman of his hidden interest in a brokerage firm called J. M. Kelsey & Co.:

"Q What was your relationship to J. M. Kelsey?

"A I was a hidden underwriter. I had been barred from the securities business in 1961 so I couldn't disclose that I was an owner of J. M. Kelsey & Company. So I had my friend Jack Kelsey for a firm and I was the hidden owner.

"Q Did you have any conversations with Mr. Sam Weisman or Mr. Herbert Weisman about that?

"A Yes, sir.

"Q When?

"A Constantly. Sam or Herb would ask me how I am doing, how is the business going, how is everything going, because I would see them quite often, we were in the same building.

"THE COURT: Do I understand that you are saying you told the defendant Mr. Weisman that Kelsey was just a front for you, that you were the hidden owner of Kelsey?

"THE WITNESS: One of the owners. Kelsey owned part of it himself, sir, but I was one of the hidden owners, and I told Mr. Weisman that.

"THE COURT: You told Mr. Weisman that?

"THE WITNESS: Both Herbert and Sam.

"THE COURT: I don't care about Herbert. He is not on trial here.

"THE WITNESS: Yes I did.

"THE COURT: Did you tell the defendant Mr. Weisman?

"THE WITNESS: Yes." (64a-65a)

Also, Hellerman was permitted to testify that he gave Weisman a copy of the indictment in the Imperial Investment case:

"Q Did there come a time, Mr. Hellerman, when you handed a copy of the Imperial Investment Company indictment to Mr. Weisman?

"A Yes, sir." (93a)

That the government's purpose in offering the above referred to evidence was to reinforce Hellerman's testimony that Weisman knew of the AIS manipulation before he purchased the AIS shares on May 3, 1971 is clear from the following question asked of Hellerman following all of the above:

"Q Now, Mr. Hellerman, following all of these events which you have testified about came your conversation with Mr. Weisman concerning Automated Information Systems which you testified about; is that correct?

"A Yes, sir." (94a)

## POINT I

### IT WAS REVERSIBLE ERROR TO REFUSE TO INSTRUCT THE JURY AS TO THE USE OF THE EVIDENCE CONCERNING WEISMAN'S PREVIOUS TRANSACTIONS AND ASSOCIATION WITH HELLERMAN

It is universally recognized that evidence of criminal acts not charged in the indictment is admissible, if at all, only as circumstantial evidence going to a specific issue such as identity, motive, or intent, and not for the purpose of exposing the accused as a "bad man" generally. Richardson on Evidence, ¶ 175 (9th Ed.); McCormick on Evidence, § 190 (2nd Circuit). As this Court stated in United States v. DeCicco, 435 F. 2d 478 (2d Cir. 1970):

> "Evidence of prior crimes is customarily not admissible to show the disposition, propensity or proclivity of an accused to commit the crime charged. Boyd v. United States, 142 U.S. 450, 12 S. Ct. 292, 35 L. Ed. 1077 (1892). See Michelson v. United States, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948) and cases of this circuit, United States v. Smith, 283 F. 2d 760, 763 (2 Cir. 1960), cert. denied, 365 U.S. 851, 81 S. Ct. 815, 5 L. Ed. 2d 815 (1961); United States v. James, 208 F. 2d 124 (2d Cir. 1953); United States v. Modern Reed & Rattan Co., Inc., 159 F. 2d 656 (2d Cir.), cert. denied, 331 U.S. 831, 67 S. Ct. 1510, 91 L. Ed. 1845 (1947)." 435 F. 2d at 483.

See, also, United States v. Brettholz, 485 F. 2d 483, 487 (2d Cir. 1973) and Rule 404(b) of the recently adopted Federal Rules of Evidence which provides:

> "(b) Other crimes, wrongs, or acts.— Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Even where such evidence is offered on a specific issue such as motive or intent, "[t]he trial judge is required, as with any potentially prejudicial evidence, to balance all of the relevant factors to determine whether the probative value of the evidence of other crimes is outweighed by its prejudicial character." United States v. Deaton, 381 F. 2d 114, 117 (2d Cir. 1967). Of course, the prejudicial impact of such evidence, particularly where it relates to prior criminal acts, relates not only to a possible conviction on the basis that a defendant is a "bad man", but also the distinct possibility that the jury will infer that the defendant committed the crime for which he is then being charged because he engaged in prior criminal acts. See United States v. Byrd, 352 F. 2d 570, 574 (2d Cir. 1965).

In order to guard against these possibilities of prejudice, and thus the misuse of such evidence by the jury, it is imperative, when evidence of prior criminal acts or prior similar transactionsis admitted, that the jury be carefully instructed on the limited bases upon which such evidence is admitted and on its proper use in their deliberation. The

general rule in this regard is stated succinctly at 23 C.J.S. Criminal Law, § 1032(3):

> "For the reason that an accused person is not to be convicted of one crime by proof that he was guilty of another, it is the general rule, at least where the party requests such instruction, that when evidence of other crimes or offenses is admitted, it should be limited and guarded carefully by instructions to the jury, so that its operation and effect may be confined to the legitimate purpose for which it is competent and admitted."

Failure to give such a limiting instruction constitutes reversible error. Montgomery v. United States, 203 F. 2d 887 (5th Cir. 1953); Orloff v. United States, 153 F. 2d 292 (6th Cir. 1946). In Montgomery, the Court reversed a conviction for income tax evasion where evidence of exaction of bribes by the defendant was admitted at trial as relevant in suggesting a motive for failure to report income. The Court approved the trial court exercise of discretion in admitting "other crimes" evidence, but found error in the trial court's failure to include limiting instructions:

> "The fact that the evidence objected to tended to establish that the accused committed offenses other than those charged in the indictment would be no justification for excluding it if it tended also to establish the commission of the crime charged in the indictment...We think, however, that the jury should have been cautioned that the evidence was admitted only for the light that it might throw on the federal offenses on trial, and that no inference of guilt could be drawn merely from the commission of other offenses different in character. In short, the jury should not convict the defendant of income tax evasion because they concluded that he was a

> grafter....When the testimony and the parts of the arguments copied in the record are read in an effort to 're-live the whole trial,' we can see the difficulty of the task faced by court and jury in confining their consideration to the federal offenses on trial. That difficulty but emphasizes the precautions that should be observed by the court and the district attorney to insure the defendant a fair trial on the offense alone with which he was charged." (203 F. 2d at 891-2; Emphasis added.)

Likewise, in Orloff v. United States, supra, the Court, in a case involving the illegal transportation of liquor and consequent Internal Revenue Code violation, held that:

> "The [trial] court committed prejudicial error in its failure properly to limit the scope of certain testimony as to the commission by the appellant of a similar offense fifteen years before that charged in the indictment. (153 F. 2d at 294)

Although we have been unable to find a decision by this Court that turns on the failure of the Court to give a proper limiting instruction as to the use of evidence of prior similar transactions, there are numerous cases where the discussion of admissibility includes the observation that appropriate limiting instructions were given. See, e.g., United States v. Warren, 453 F. 2d 738, 745 (2d Cir. 1972), cert. denied 406 U.S. 944 (1972) ("The Court properly admitted the evidence and instructed the jury on its use"); United States v. Freedman, 445 F. 2d 1220, 1224 (2d Cir. 1971), ("... a limiting instruction was given"); United States v. Egenberg, 441 F. 2d 441, 444 (2d Cir. 1971), cert. denied 404 U.S. 994 (1971) ("We note also that the court in the charge carefully

limited the purpose for which the jury was to consider this evidence"); United States v. Deaton, 381 F. 2d 114, 118 (2d Cir. 1967) ("The court limited the use as evidence to the issue of intent and so instructed the jury at the time it overruled the objection and later in the charge"); United States v. Braverman, 376 F. 2d 249, 252 (2d Cir. 1967), cert. denied 389 U.S. 885 (1967) ("The jury was cautioned that [evidence of similar transactions was] introduced as contemporaneous similar actions to show motive and intent"); United States v. Morrison, 348 F. 2d 1003, 1005 (2d Cir. 1965), cert. denied 382 U.S. 905 (1965) ("Because defendants may be seriously prejudiced by the introduction, even though proper, of evidence bearing on their past criminal offenses, careful instructions are appropriate to limit the degree of the prejudice. The principal danger...is that the government will introduce the evidence and that the jury will take it as proof of guilt"); United States v. Robbins, 340 F. 2d 684, 688 (2d Cir. 1965), ("...Judge Bryan carefully charged the jury on the 'very limited purpose' for which the evidence of similar transactions was admitted"); and United States v. Klein, 340 F. 2d 547, 549 (2d Cir. 1965) cert. denied 382 U.S. 850 (1965)("... it is well within the trial judge's discretion to permit the Government, on a properly limited basis, to introduce evidence of prior similar offenses...it was therefore admissible notwithstanding the possibility that the jury might have used the evidence in a prejudicial manner contrary to Judge Tyler's careful instructions").

As indicated in the above quoted testimony (pages 12- to 21), defendant Weisman's counsel objected each time the

government sought to elicit testimony from Hellerman concerning his prior transactions with Weisman, specifically, the Tabby's, Imperial and Belmont stocks. With respect to each of these "deals", which preceded Weisman's purchase of the AIS stock, Hellerman testified that he informed Weisman that he had a "box" on the stock and that he was manipulating it.* He admitted, however, that despite the apparent opportunity of a sure profit, as far as he knew Weisman had purchased only the Tabby's stock.**

In his summation to the jury, the Assistant United States Attorney dwelt at length on these prior dealings and transaction between Weisman and Hellerman and Weisman's prior association with Hellerman.*** The entire thrust of the summation, we submit, was to impress upon the jury the fact that Weisman was a bad man for associating with the likes of Hellerman and for making money in the stock market and that he must, therefore, be guilty of the charges contained in the

---

* Weisman admitted that he had purchased Tabby's on Hellerman's recommendation but denied ever being told by Hellerman of any manipulation schemes with respect to Tabby's, Imperial or Belmont. (234a-237a)

** Despite Hellerman's testimony that Weisman was to keep Hellerman's share of the Tabby's profit and apply it to amounts owed by Hellerman to Weisman on the Reno deal, the evidence shows that there was no such application of profits. Indeed, even though Hellerman testified with respect to objections he had to amounts Weisman was claiming in a lawsuit commenced to recover amounts owed to him by Hellerman, no mention was made that Weisman had failed to give Hellerman credit for his "share" of the Tabby's profit.

*** 350a, 353a-359a, 366a, 370a-371a.

indictment. This is evident from the government's reference in the summation to "circumstantial" evidence. There was no "circumstantial" evidence in this case other than the circumstantial evidence that Weisman had previous dealings and associations with Hellerman, therefore giving rise to the inference that he was part of the conspiracy involved in this case or, as the Assistant United States Attorney put it in his summation, "on the circumstantial evidence in this case these defendants have jam all over their faces". (337a)

That the jury placed heavy reliance and, thus, misused the evidence of Weisman's prior dealings and associations with Hellerman is evident from their verdict. Hellerman testified that he told both Weisman and Lassoff that he had a box on the AIS stock and was manipulating it. Indeed, according to Hellerman, his dealings with Lassoff were much more extensive than his dealings with Weisman during the period May 3, 1971 through May 16, 1971.* Clearly, if the jury believed every-

---

* Hellerman testified to only one meeting with Weisman during this period, that being on May 16, 1971 at the so-called "breakfast meeting" and only to a few telephone conversations—on May 3 when Weisman purchased the AIS stock (94a-96a), a few days later when he spoke to Weisman about Frohlich's call (108a), and possibly a telephone call arranging the May 16 meeting (114a). Compare this to Hellerman's three meetings with Lassoff—at Cohen's office (99a-103a), at Al Cooper's restaurant (112a-114a), and at the May 16 breakfast meeting (114a-119a)—and his numerous telephone conversations with Lassoff which, according to Hellerman, occurred "[e]very day, a few times a day" (104a).

thing Hellerman said, they would have convicted both Lassoff and Weisman. The only other evidence, and indeed the only way the jury's verdict can be rationalized, is the evidence of Weisman's prior dealings and associations with Hellerman. Without any instruction as to the very limited purpose for which evidence was admitted, it is highly likely that the jury completely misused it and convicted Weisman solely on the ground of guilt by association.

Following the inordinate reference to this prior transaction and prior association evidence in the government summation, defendant Weisman requested* an instruction to the effect that such evidence was not evidence or proof that at a later time Weisman actually committed the offenses charged in the indictment (410a-411a). The Court declined to give such a charge (411a) and, therefore, the case was given to the jury without any instruction whatever on how this evidence was to be used in their deliberation.

Indeed, we submit that the Court's charge as given indicated that the jury could use this evidence for any purpose they saw fit. During the course of its charge, the Court instructed the jury as follows:

---

* Defendant Weisman attempted without success to submit the requested charge to the Court prior to the Court's charge on November 26. Following the Court's charge, the requested instruction was read into the record. (410a-411a)

"What I have just told you, however, is subject to one limitation. You will recall that on several occasions you were specifically told that certain evidence was admitted solely with respect to the defendant Weisman. You are instructed to consider such testimony only with respect to Mr. Weisman and you must not consider such testimony in the slightest degree in your discussions and deliberations with relation to Mr. Lassoff." (388a)

The only evidence which was admitted "solely with respect to the defendant Weisman" was the evidence of the Tabby's transaction (67a, 78a) and the Belmont transaction (90a). The implication or inference to be drawn from the above charge is, therefore, that the jury could consider the evidence with respect to Tabby's and Belmont for whatever purpose they deemed appropriate so long as they considered it only with respect to defendant Weisman. Indeed, this conclusion is reinforced by the Court's comment, made at the time of Hellerman's testimony with respect to Belmont that "[t]he jury will limit such testimony solely to the defendant Weisman. It does not apply to the defendant Lassoff." (90a)

In conclusion, the trial court, in its discretion, admitted highly prejudicial evidence apparently feeling that this evidence, although prejudicial, was admissible under the applicable principles discussed above. Yet, the jury was not given any instruction whatever on the very limited purpose for which such evidence could be used. We respectfully submit that under the authorities cited above, and in view of the verdict rendered herein, the admission of such evidence without a limiting instruction constituted reversible error and requires the granting of a new trial.

## POINT II

### IT WAS REVERSIBLE ERROR TO ADMIT EVIDENCE OF WEISMAN'S PRIOR DEALINGS WITH HELLERMAN ON THE GOVERNMENT'S DIRECT CASE IN THAT SUCH EVIDENCE WAS NOT NECESSARY IN ORDER FOR THE GOVERNMENT TO MAKE OUT A PRIMA FACIE CASE

In this case, the prosecution set out to prove that defendant Weisman's purchase of stock, which is ordinarily a lawful act, was in fact part of a conspiracy and scheme to manipulate stock. In order to prove that Weisman's purchase of stock was a criminal act, the prosecution was required to prove the defendant's guilty knowledge in effecting the purchase. As previously noted, the government attempted to prove this through the testimony of Michael Hellerman, who claimed that he disclosed to Weisman, at the time Weisman purchased the AIS stock, the existence of a manipulative scheme involving the stock (p. 10, supra). This testimony was the sum total of direct evidence against the defendant on the critical issue of intent.

It is doubtful that the jury would have found this evidence sufficient to convict defendant Weisman in that defendant Lassoff was acquitted. As previously noted (p. 28, supra), the evidence as to Lassoff in connection with the AIS stock was even greater than the evidence against Weisman in this regard. However, this failure in the government's case would not have been a result of the absence of direct proof but, rather,

the jury's disbelief of Hellerman's testimony in general. As previously noted, this disbelief of Hellerman is the only rationalization for the jury's acquittal of Lassoff.

Apparently, recognizing that Hellerman would not be held in the highest esteem by the jury, the prosecution, although it did not need such evidence for a prima facie case, introduced in its case-in-chief evidence concerning Weisman's alleged participation or knowledge of other previous stock manipulations engineered by Hellerman.

Although evidence of prior similar crimes or transaction, though inflammatory and prejudicial, may be admissible as circumstantial evidence on the question of knowledge or intent, the trial court's discretion in admitting such evidence is controlled by established rules which, under the circumstances of this case, dictate that the profferred evidence of other stock manipulations either should not have been admitted at all or should, at most, have been admitted only during the prosecution's rebuttal, after the "sharpening" of the issue (and the consequent need for further prosecution evidence) occasioned by the denial of criminal intent by the defendant on the stand.

An analysis of the relevant cases on the issue of admissibility of evidence of "other crimes" demonstrates that such testimony in this case by Hellerman was erroneously ad-

mitted. United States v. Ross, 321 F. 2d 61 (2d Cir. 1963), is a leading case illustrating the proper use and order of presentation of "other crimes" evidence. In Ross, the defendant, a stock broker, was charged with making fraudulent representations in the sale of a stock being "pushed" by his firm. After the defendant claimed that he was merely passing along information given to him without any knowledge of its falsity, the prosecution cross-examined him with respect to other fraudulent sales campaigns involving other stocks in which the defendant had participated. This Court upheld this use of "other crimes" evidence bearing on the issue of criminal intent, particularly approving of its employment as an instrument of rebuttal rather than as primary evidence of guilt, stating:

> "...when the crime charged involves the element of knowledge, intent, or the like, the state will often be permitted to show other crimes in rebuttal, after the issue has been sharpened by the defendant's giving evidence of accident or mistake, more readily than it would as part of its case in chief at a time when the court may be in doubt that any real dispute will appear on the issue.' McCormick, supra, at 331. Here Ross had sought in his direct testimony to depict himself as an unwilling tool...[i]t was wholly proper for the Government to rebut this claim of ignorance and innocence by showing that Ross had long drifted among houses selling similarly worthless stocks by similar methods." (321 F. 2d at 67; Emphasis added.)

The same principle was applied in United States v. Klein, 340 F. 2d 547 (2d Cir. 1965), where the defendant was accused

of aiding and abetting a confederate in forging travelers' checks. The defendant's claim of ignorance of any wrongdoing was countered by the prosecution with testimony of previous collaborators with defendant on similar forgery schemes. Again, this Court found appropriate the use of "other crimes" evidence as a defensive weapon for the prosecution, faced with vigorous protestations of innocence by a defendant on the issue of guilty knowledge, remarking:

> "Where, as here, the evidence is susceptible of the interpretation that the acts alleged to constitute the crime were innocently performed and the vital issues of knowledge and intent are keenly disputed, it is well within the trial judge's discretion to permit the Government, on a properly limited basis, to introduce evidence of prior similar offenses demonstrating the unlikelihood that the defendant was a mere innocent, unknowing bystander." (340 F. 2d at 549; Emphasis added.)

The rules controlling the trial court's discretion as to whether and at what point "other crimes" evidence may be admitted are most fully explained in United States v. Byrd, 352 F. 2d 570 (2d Cir. 1965). The facts in Byrd are strongly analogous to those here. The defendant Byrd, an IRS auditor, was charged with two counts of receiving bribes in connection with the review of tax returns, based on two incidents of such conduct. The government's evidence on the various elements of the crime apparently came principally from the testimony of one Kaufman, a tax accountant, who funnelled "fees" from his clients under audit to Byrd in order to influence the review

of his clients' returns. In addition to describing the two incidents covered by the indictment, Kaufman testified during the government's direct case that yet another virtually identical transaction took place involving other Kaufman clients, the Sandburgs, and the defendant.

Although the defendant's conviction was reversed because of erroneous jury instructions, this Court took occasion to warn the trial court, in an extensive discussion, that admission of evidence on the Sandburg incident, particularly during the government's main case, might again result in reversible error. The Court related that the other incident testimony was offered in the main case to show criminal intent and that the defense made a "vigorous objection" to its admission. The Court recognized that the trial judge exercises a "wide range" of discretion in admitting such evidence, but also recognized that the prejudicial impact of such evidence is considerable, since

> "there can be no complete assurance that the jury even under the best of instructions will strictly confine the use of this kind of evidence to the issue of knowledge and intent and wholly put out of their minds the implication that the accused, having committed the prior similar criminal act, probably committed the one with which he is actually charged." (352 F. 2d at 574)

After thus noting the prejudicial character of such evidence, the Court proceeded to evaluate its probative value. It

first recognized (i) the cumulative, rather than corroborative nature, of "other crimes" evidence in that, like in the instant case, it was supplied by the very same witness who testified against the defendant on the charges contained in the indictment; and (2) the fact that there was no real need in the direct case for such oblique evidence of criminal intent since there was direct evidence that the bribe was handed over with full understanding of its purpose. In light of these facts, the Court concluded that "[t]here was...no pressing necessity that evidence of that prior occasion be offered on the Government's main case." [Citing United States v. Ross, supra.] The Court also cautioned that "[w]here the prejudice is substantial and the probative value, through the nature of the evidence or the lack of any real necessity for it, is slight, its admission [on the direct case] may be held to be an abuse of discretion" (352 F. 2d at 575; emphasis added), and that "[u]nder such circumstances the better practice would be to sustain the objection to the offer on the Government's main case without prejudice to its re-offer in rebuttal, if then warranted." (352 F. 2d at 575)

The facts here present virtually a mirror image of the Byrd situation. Again, the government has sought to present in its main case prejudicial testimony on other transactions that is both cumulative and unnecessary, since the incriminating evidence in the record relating to the charges of the indictment comes from the mouth of the very same witness, and

that testimony, if believed, contains ample evidence of guilty knowledge. The government's evidence on the charges themselves is not reinforced or corroborated by "other crimes" testimony given by its chief accusing witness and without such a gain in probity, the prejudicial effect cannot be justified, especially when offered during the direct case. This is the essence of the Court's extensive discussion in Byrd, and to hold other-crimes evidence admissible under the Byrd circumstances would be to destroy the delicate balancing of policy objectives achieved in that case.

In United States v. Gardin, 382 F. 2d 601 (2d Cir. 1967), the teaching of Byrd was reaffirmed and elucidated. In Gardin, the defendant was arrested with "marijuana" in the trunk of his automobile. The government on its direct case presented the testimony of a narcotics agent not involved in the transaction covered in the indictment, who related another incident in which defendant offered to supply the agent with illegal drugs. The defendant subsequently testified in his defense that he had no knowledge of the presence of "marijuana" in his car, and denied the substance of the alleged conversation in the separate incident.

On appeal, the defendant sought to expand the doctrine of Byrd by asserting the broad rule that other-crimes evidence

on the issue of knowledge or intent is never admissible in the government's case-in-chief, but, rather, is admissible only on rebuttal after the defendant has denied knowledge. The Court refused to so expand the doctrine, explaining that its force applied to situations where the testimony was essentially cumulative, and evidence of intent was already present. The admissibility in Gardin of "other crimes" evidence which carried the probative impact of a corroborating incident reported by a "fresh" witness, and which tended to fill a significant gap in the government's proof of the elements of the crime charge was reconciled with the presumptive inadmissibility of the evidence in Byrd thusly:

> "Nothing in United States v. Byrd, supra, is to the contrary. We did say there that where potential prejudice is substantial and probative value and the Government's need are slight, the better practice would be for the trial judge to exclude the evidence from the Government's case in chief without prejudice to its re-offer on rebuttal, if then warranted. In that case the evidence in question was cumulative to testimony, already given by the same witness on the issues of intent as shown by the circumstances directly involved in two of the offenses charged. To add to this very compelling evidence of intent the same witness' recital of another similar crime, opened the door to prejudice and supplied little or nothing of probative worth, because proof of the element of intent in both of those two counts was bound to turn upon what the triers thought about the witness' credibility." (382 F. 2d at 604)

See, also, United States v. Adams, 385 F. 2d 548, 551 (2d Cir. 1967), where Judge Friendly, in setting guidelines to be followed

with respect to certain evidence in the new trial ordered, stated:

> "The evidential value of the [evidence of a conversation concerning a similar transaction that never transpired] is principally in showing the accused's state of mind; proof of this might better be deferred until the defense case makes it necessary to develop evidence of other crimes for that purpose."

It is, we submit, clear that in the instant case the testimony of Hellerman, defendant's main accuser, as to prior incidents, is cumulative, unnecessary and lacking in independent credibility. To admit such testimony in the direct case and thus force the defendant to take the stand and rebut, point by point, the insinuated history of related vices, is to condone a flagrant act of prosecutorial over-kill. The authority of the line of cases culminating in Byrd and Gardin, supra, stand to prevent such prejudice.

As stated in Note, Other Crimes Evidence at Trial: Of Balancing and Other Matters, 70 Yale L.J. 763, 769-70 (1961):

> "Probative worth is a complicated notion. Because other crimes evidence is generally circumstantial, its use demands an inference from the fact of the 'other crime' to the fact of proposition in issue...A prior conviction or plea of guilty establishes the commission of the other crime with a high degree of certainty. Often, however, other crimes evidence may include acquittals for technical reasons, arrests which did not lead to trial, police observations not culminating in arrest, and police or private suspicions often not based on di-

> rect observation. In such cases, the judge must make a double evaluation of its probative worth, tracing the inference from the testimony to the commission of the other crime, and then to the fact in issue."

In the instant case, the strength of the inference to be drawn, i.e. that because Hellerman claimed to have told Weisman of an illegal scheme on a prior occasion, he told him the same thing on a later occasion, is, we submit, not great enough to warrant the prejudice inherent in the admission of such testimony. Hence, we respectfully suggest, that its admission during the government's main case was erroneous and requires a new trial.

Moreover, had the evidence of prior transaction not been admitted in the government's main case, defendant Weisman would have been in the same, if not better, position than defendant Lassoff. The only issue would have been the credibility of Hellerman and there would have been no pressing need for Weisman to take the stand in his own behalf. However, faced with Hellerman's testimony of these prior transactions, evidence which we submit, under the authority of Byrd, should not have been admitted, Weisman was forced to take the stand in his own behalf and rebut Hellerman's accusations point by point. We respectfully submit that to place a defendant in this position because of improperly admitted evidence violates his right as guaranteed by the Fifth Amendment.

Support for this argument is found in the Supreme Court's decision in Harrison v. United States, 392 U.S. 219 (1968). There, the defendant had been tried for felony and murder. His conviction had been reversed, however, upon the ground that confessions admitted at the trial had been illegally obtained and, therefore, were inadmissible. Upon remand, the government read to the jury the testimony given by the defendant at his first trial.

The Court first recognized that as a general rule a

> "waiver [of one's privilege against compulsory self-incrimination] is no less effective or complete because the defendant may have been motivated to take the stand in the first place only by reason of the strength of the lawful evidence adduced against him." (392 U.S. at 222; Emphasis added.)

The Court held, however, that this general rule was not applicable in that defendant had

> "testified only after the Government had illegally introduced into evidence three confessions, all wrongfully obtained, and the same principles that prohibits the use of confessions so procured also prohibits the use of any testimony impelled thereby...." (392 U.S. at 222)
>
> * * *
>
> "The question is not whether the petitioner made a knowing decision to testify, but why. If he did so in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible." (392 U.S. at 223; Emphasis in original.)

We respectfully suggest that the rule followed by the Supreme Court in Harrison demonstrates that defendant Weisman's Fifth Amendment rights were violated when he was compelled, by reason of inadmissible evidence, to testify in his own behalf.

## POINT III

### COUNT III OF THE INDICTMENT SHOULD BE DISMISSED BECAUSE FEDERAL JURISDICTION IS LACKING

One of the jurisdictional elements of an offense under Section 10(b) of the 1934 Act is the use in the transaction by one of the parties, directly or indirectly, "of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange."

The only proof offered by the government that arguably meets this requirement is that of an intrastate telephone call. The circuits are split on the question of whether such a call, by itself, has the consequence of imposing the federal regulatory scheme on the transaction. There are, however, a significan number of cases wherein courts have refused to hold that intrastate telephone calls meet the jurisdictional test of Section 10(b). See Burke v. Triple A Machine Shop, 438 F. 2d 978, 979 (9th Cir. 1971); Rosen v. Albern Color Research, 218 F. Supp. 473, 475-76 (E.D. Pa. 1963); Arber v. Essex Wire Corp., 342 F. Supp. 1162, 1163-64 (N.D. Ohio), affirmed without discussion of jurisdictional issue, 490 F. 2d 414 (6th Cir. 1974).

Very recently, the District Court of Louisiana, con-

fronted with the issue of whether an intrastate telephone call confers jurisdiction under Section 10(b), thoroughly examined the decided cases, the legislative language and history, and the policy considerations and reached the conclusion that jurisdiction could not lie. Dupuy v. Dupuy, 375 F. Supp. 730 (E.D. La. 1974). The Court scrutinized the reasoning of the "leading" case of Nemitz v. Cunny, 221 F. Supp. 571 (N.D. Ill. 1963), and found it to be based on misreadings of the cases cited as precedents. It observed at 733:

> "The Nemitz, Lennerth, and Bredehoeft cases paradoxically have formed the foundation for a line of jurisprudence supporting jurisdiction based solely on intrastate telephone calls which has gained acceptance, albeit acceptance without careful scrutiny of the reasoning and actual holdings of the root cases."

The Court in Dupuy strongly dissented from the view that any use of an instrumentality, a telephone or a car for example, that could be used in interstate commerce must be considered a "means or instrumentality of interstate commerce" (with federal jurisdictional consequences attaching) in every instance.

> "The characteristics of the telephone require not a per se classification procedure, but, rather, a logical test which appropriately will distinguish between local and interstate activity. The most rational method to achieve this end is

> that formulated in Rosen, Burke and Arber which would classify the use of the telephone as an interstate or intrastate activity according to the nature of the calls made at the time in question. Applying that test in the instant case, the Court decides that the local and intrastate use of a telephone is not the use of an instrumentality of interstate commerce for Section 10(b) purposes even though the telephone had the capability of making interstate calls." (375 F. Supp. at 736)

In the antitrust field, the Supreme Court has recently indicated, in Gulf Oil Corp. v. Copp Paving Co., Inc., 43 U.S.L.W. 4059 (1974), that where the imposition of a federal regulatory scheme depends on a threshold finding of a meaningful connection to interstate commerce, evidence of an attenuated or merely theoretical relationship will not support federal jurisdiction.

In light of this recently enunciated view and the reasoning of Dupuy, it is submitted that the more flexible and sensitive test articulated in Dupuy should be applied in this case involving, as it does, criminal sanctions.

## POINT IV

## PROSECUTORIAL MISCONDUCT THROUGHOUT THE TRIAL WARRANTS THE GRANTING OF A NEW TRIAL

As the trial progressed, it was obvious that the government was attempting to shore up an exceedingly weak case with evidence of Weisman's prior dealings and associations with Hellerman. Although some of this evidence may have been admissible at a certain point in the trial on the question of intent, we respectfully suggest that the government transgressed the limits of propriety when (a) it proceeded to question defendant Weisman as to whether he knew certain members of organized crime, without making any demonstration whatever that its inquiries in this regard were based upon a good faith belief that Weisman knew these individuals, (b) it referred in its summation to certain evidence that had clearly been stricken by the Court, and (c) it attempted in its summation to impeach the credibility of its own witness.

The government's strategy, which was, we submit, to obtain a conviction at any cost, became obvious very early in the trial. During his opening statement, Mr. Walker, the Assistant United States Attorney, referred to Mr. Weisman as "a long time associate of" Hellerman (36a) and then, a few moments later told the jury to ask themselves "why were Weisman and Lassoff doing business with Mr. Hellerman." (40a)

However, the government was not content to rest upon Weisman's prior association with Hellerman. Thus, in cross-examining Weisman, the government, by means of certain questions, attempted to give the jury the impression that Weisman had been associated with certain undesirable individuals who he knew to be connected with organized crime. For example, early in the cross-examination, the following questions were posed with respect to the so-called "Reno deal":

"Q Let's turn to the Reno deal.

When you went out to Reno did you meet Sidney Handweiler out there?

"A Yes.

"Q What was Mr. Handweiler's occupation at that time?

"A I don't know what his occupation was.

"Q Didn't you know that he was a bookmaker at that time?

"A Oh, no, I didn't know it.

"Q Did you meet a Billy Carr out there?

"A Yes.

"Q Who was Billy Carr?

"A I have no idea. I only met him there for the first time and was introduced to him.

"Q Was he introduced to you as a bodyguard of Mickey Cohen?

"A A what?

"Q A bodyguard of Mickey Cohen at that time.

"A Absolutely not.

"Q Do you know who Mickey Cohen is?

"A I have heard the name.

"MR. GOULD: If your Honor please, I object to this. This isn't proper cross-examination.

"THE COURT: Overruled.

"A I have heard the name Mickey Cohen, but I never met him or had anything to do with him.

"Q You know that Mickey Cohen is a gangster, do you not?

"A Only --

"THE COURT: He said he never met him.

"MR. WALKER: My question is what his knowledge is, your Honor.

"THE COURT: What difference does it make if he never met him or saw him? I know a lot of people walk in and out of this courtroom. It doesn't mean anything does it?

"MR. WALKER: Very well.

"THE COURT: Unless you are going to prove that Mickey Cohen was involved in the Reno deal. I assume you are not." (312a-313a)

Later on in his cross-examination, the Assistant returned to a similar line of inquiry:

"Q Mr. Weisman, now you attended and gave a speech at the 1970 memorial dinner for Louis Hellerman at the Americana Hotel?

"A Yes, I did.

"Q And at that dinner you were introduced to Vincent Aloi and others; is that correct?

"A Absolutely not.

"Q Well, you knew they were present at that dinner?

"A I didn't. I never met those gentlemen, never knew they were there.

"Q When Mr. Hellerman was indicted, isn't it a fact that you learned that he was named in an indictment with several of those individuals?

"A I learned he had been named with Johnny Dio -- Johnny Dioguardi, yes.

"Q And that Mr. Hellerman was deeply involved with those individuals at that time?

"MR. GOULD: Just a minute. Would you read that?

[Record read.]

"MR. GOULD: I object to it.

"THE COURT: Sustained.

"Q Did you learn when you learned of the Imperial indictment that Carmine Trumanti was named in that indictment?

"A No, I don't recall that name at all.

"MR. GOULD: Objection.

"THE COURT: Overruled.

"Q Did you learn that Vincent Aloi was named in that indictment?

"A No, sir.

"MR. GOULD: If your Honor, please, I don't think --

"THE COURT: Overruled.

"MR. GOULD: -- in the absence of some showing who these people are --

"MR. WALKER: There has been ample testimony, your Honor.

"THE COURT: There has been ample testimony in this record about who these people are from Mr. Hellerman.

"MR. GOULD: No, there was no testimony that he knew who they were, that Weisman knew who they were.

"THE COURT: He's trying to find out whether he knew.

"Q Mr. Weisman, did you know that he had been named in an indictment with Vincent Gugliaro?

"A No, sir.

"Q Do you know that he had been named in an indictment with Vincent Lombardo?

"A No, sir.

"Q Pasquale Fusco?

"A No, sir.

"Q John Savino?

"A No, sir.

"Q Philip Bonodono?

"A No, sir.

"Q So it was just John Dioguardi or Johnny Dio?

"A The only name that I recall, yes." (314a-17a)

* * *

"Q At the time that you heard that Mr. Hellerman had been indicted with John Dioguardi, did you relate that back to the

1970 dinner and reflect on the fact that you may have met Mr. Dioguardi there?

"A No, absolutely didn't.

"THE COURT: He denied he met him.

"Q How you were a speaker at the 1968 dinner?

"A Yes.

"Q As well, is that correct?

"A That is correct.

"Q And were you introduced to any of Mr. Hellerman's associates at that dinner?

"A The only one I was introduced to, as I recall, was the Surrogate of Nassau County.

"Q Surrogate of Nassau County.

But you weren't introduced to Mr. Aloi or Mr. Dioguardi or Mr. Trumanti or any of those individuals?

"A Absolutely not. I never knew or met any of those gentlemen." (318a-19a)

The recitation by the government of the above names to the jury, in the context of questions to Weisman as to whether he knew these individuals is, we respectfully submit, highly improper. The only purpose that such questions could serve is to plant in the jury's mind the idea that Weisman did in fact know these men, thus permitting the jury to infer that Weisman was somehow mixed up with them. In short, the government was attempting to have the jury surmise that Weisman knew these men and then have him convicted because of such surmised association. Little discussion is needed of the principle that

under our judicial process "[g]uilt cannot be inferred merely by association." United States v. DeCicco, 435 F. 2d 478, 483 (2d Cir. 1970).

Comments by the Assistant United States Attorney in his summation further demonstrates that his primary concern was to secure a conviction against Mr. Weisman and not to obtain a just verdict based upon admissible evidence. At the outset we note that because of various improper statements made in the government's summation defense counsel was forced, on a number of occasions, to register objections. On at least four occasions, these objections were sustained (335a, 345a, 347a, 355a). On one occasion, relating to Mr. Cohen's testimony, the Assistant persisted in his argument despite his admonishment by the Court:

> "Mr. Cohen testified. Now, Mr. Cohen I submit to you was very friendly with Harold Lassoff and was still a friend of Harold Lassoff and he got on that stand, frankly, kicking and screaming to avoid testifying against Mr. Lassoff. He was not a very cooperative witness for the government.
>
> "THE COURT: I am sorry. I didn't get any impression that he was kicking and screaming when he got on the stand.
>
> "MR. WALKER: Very well, your Honor. That may be a bit of zeal in summation.
>
> "I submit to you that he was not being completely candid in this case with you.
>
> "MR. GOULD: I object, your Honor. He was the Government's own witness.

"THE COURT: Sustained.

"MR. WALKER: Because I submit to you that Mr. Cohen did not -- and this is where you have to use your common sense -- that he did not admit the fact and didn't want to admit the fact that he was splitting profits with Hellerman in this case.

"MR. GOULD: Your Honor, I regret the necessity to interrupt --

"THE COURT: He denied it.

"MR. WALKER: I am aware of that, Your Honor.

"THE COURT: Are you saying he lied, the man you put on the stand lied?

"MR. WALKER: I am saying --

"THE COURT: There was no indication that he was a recalcitrant witness.

"MR. WALKER: Your Honor, may I go forward?

"I ask the jury and I suggest that you can draw your own conclusions from the facts in this case. Is it conceivable that Mr. Hellerman would put up half the cash to anyone and not get half the proceeds in return?

"MR. GOULD: If your Honor pleases, he persists in arguing what your Honor told him not to.

"THE COURT: You put him on the stand. You heard the story. There was no indication that you thought your witness was lying when you put him on." (346a-48a)

Also, during his summation, the Assistant referred on two occasions to testimony that had clearly been stricken by the Court. This testimony, given by Mr. Hellerman, referred to the alleged representation of Hellerman by Mr. Weisman's

son in a so-called "stolen bond" case:

"Q Did you subsequently have another conversation with Mr. Sam Weisman?

"A Yes, sir.

"Q What did you tell Mr. Weisman at that time and what did Mr. Weisman say?

"MR. GOULD: When? Where?

"THE WITNESS: In Mr. Weisman's office.

"Q Approximately how long after the conversations that you have testified to so far?

"A I can't be accurate about that. I can give it -- I know another event that happened that could fix that time, sir, but I can't -- I don't know -- there is another event that happened that I could fix that time with.

"Q What event is that?

"A When I was under investigation by New York State on a stolen bond case that Herbert represented me on.

"MR. GOULD: If your Honor please, I move to strike it out.

"THE COURT: Strike that. The jury will entirely disregard it.

"Please stop volunteering around here.

"Q Mr. Hellerman, would you tell us now what the conversation was you had with Sam Weisman?

"A In Mr. Sam Weisman's office I went over my retainer agreement that I had made with Mr. Herbert --

"MR. GOULD: Move to strike it out.

"Q What did you say?

"A I told Mr. Weisman that Herbert had gotten $5,000 in cash, meaning a check, from another attorney of mine as a down payment on the retainer and that I didn't -- Herbert wanted another $5,000 and I didn't have that $5,000, the second $5,000, available to give Herbert, so I made a deal with Herbert, and this I was telling to Sam, where I gave him X amount of shares -- I don't remember the amount of Imperial shares now -- and I told Sam that I told Herbert that the agreement Herbert and I had made was that if Herbert got less than $5,000 for the sale of those Imperial shares I would make up the difference towards his fee, but if he got more than $5,000 for the sale he could keep whatever he got over the $5,000.

"THE COURT: I strike the conversation. It has nothing to do with the defendant Weisman.

"MR. WALKER: Your Honor, this conversation is with the defendant Weisman.

"THE COURT: What has that got to do with the charges against the defendant Weisman in this lawsuit?

"MR. WALKER: Your Honor, there has been evidence that he told the defendant Weisman this was a rigged stock and that --

"MR. GOULD: There is no --

"THE COURT: Wait a second. I sustain the objection. The conversation is stricken and the jury will ignore it.

"The mere fact that a witness tells X what he did with Y doesn't make X subject to indictment and conviction on a charge.

"MR. WALKER: Nobody is suggesting that.

"THE COURT: Proceed, Mr. Walker.

"MR. WALKER: Very well, your Honor." (86a-89a)

Despite the Court's ruling, as reflected above, the following comments were made by the Assistant during his summation:

> "For a man to get on the stand and say that he thought a deal was 100 per cent legitimate, as Mr. Weisman did, when he had known Mr. Hellerman for 40 years, known him since his youth, close friends of his father, he had been an attorney who represented him in a prior matter before the State Attorney General, his son had represented him in a criminal matter in the mid-60's involving stolen bonds, when in some other year he knew that his son had received Belmont or Imperial stock in return for a criminal representation of Mr. Hellerman --." (350a; Emphasis added.)
>
> * * *
>
> "Mr. Hellerman came to Mr. Weisman and explained the deal to Mr. Weisman and he told him that he controlled the stock. Weisman tells you that it was a legitimate deal and he didn't know or even suspect anything was wrong. But I submit to you that that is incredible and you can find that statement to be incredible and that he lied to you when he made that statement because the man had been deeply involved with Hellerman and Hellerman's family for years. He said that he knew Hellerman since his birth. He knew that Hellerman had been barred by the Attorney General in 1961, indeed, had represented him there, he knew that there was a stolen bond case in which his son had represented him in the mid-60's." (353a; Emphasis added.)

The prosecution also made the following highly inflammatory statement in his summation when he suggested that Weisman was guilty because he associated with the likes of Hellerman.

"Now, at the outset in the opening statement I said to you that two of the key issues in this case were who had knowledge of the scheme, and I submit to you that the proof establishes beyond any question that Lassoff and Weisman had knowledge of this scheme, and secondly, I mentioned to you that you could ask yourselves who was doing business with a man like Hellerman. The reason I asked that is not because I think or the Government thinks that a man should be convicted simply because he does business with another man, but if he does business with another man who he knows to be involved in criminal activities, then I submit to you that he cannot come in here and say that he thought it was a perfectly legitimate deal, that that makes him incredible as a matter of fact." (349a-50a; Emphasis added)

It is submitted that the cumulative effect of the instances of prosecutorial misconduct cited herein warrants the granting of a new trial. There is no way that the government's conduct could not have prejudiced defendant Weisman. Although the Court may have stated on the record that certain statements or testimony should be disregarded, it is inescapable that the jury was poisoned, thus, depriving defendants of due process of law. We respectfully suggest that where, as here, the evidence against a defendant is far from overwhelming, and is pregnant with prejudicial and inflammatory matters, a new trial should be granted.

In United States v. Callanan, 450 F. 2d 145 (4th Cir. 1971), the Court said:

"Insinuation and innuendo about collateral matters should play no part in the prosecution of a criminal charge. United States v.

> Elmore, 423 F. 2d 775, 780 (4th Cir.), cert. denied, 400 U.S. 825, 91 S. Ct. 49, 27 L. Ed. 2d 54 (1970). And the prosecutor's argument must be specially scrutinized when the trial judge, alert to potential prejudice, has cautioned restraint. If it is probable that a prosecutor's argument has engendered prejudice, the defendant must be afforded a new trial. Berger v. United States, 295 U.S. 78, 89, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); Wallace v. United States, 281 F. 2d 656, 668 (4th Cir. 1960). The remarks of the government's attorney were improper. The legitimacy of the deductions had not been raised in the bill of particulars and it should not have been introduced into the case. Whether the untoward remarks prejudiced Callanan must be tested by 'the closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate the effects of the error.' Gaither v. United States, 134 U.S. App. D.C. 154, 413 F. 2d 1061, 1079 (D.C. Cir. 1969)." (450 F. 2d at 151)

In Berger v. United States, 295 U.S. 78 (1935), the Supreme Court, in reversing a conviction based on prosecutorial misconduct, stated:

> "...we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded...." (295 U.S. at 89)

It is submitted that the action of the prosecutor in this case displays a vast accumulation of misconduct of the type denounced in Berger and requires a new trial.

## CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that a new trial should be ordered with respect to the first count of the indictment and that a judgment of acquittal should be directed with respect to the third count.

Respectfully submitted,

SHEA GOULD CLIMENKO KRAMER & CASEY
Attorneys for Defendant
330 Madison Avenue
New York, New York 10017
(212) 661-3200

Of Counsel:

Milton S. Gould
Daniel L. Carroll

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

**UNITED STATES COURT OF APPEALS**
**FOR THE ~~EIGHTH~~ SECOND DISTRICT**

*Index No.*

**THE UNITED STATES,**

**Plaintiff-Appellee,**

*- against -*

**SAMUEL WEISMAN,**

**Defendant-Appellant.**

*Affidavit of Personal Service*

*STATE OF NEW YORK, COUNTY OF* **New York** *ss.:* **New York**

*I,* Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York

*That on the* **10th** *day of* **March** *19*75 *at* **Foley Square, United States Courthouse, New York, N.Y.**

*deponent served the annexed* BRIEF *upon*

**Paul J. Curran, U.S. Attorney for the Southern District of New York**

*the* **Attorney** *in this action by delivering* ~~a~~ *true copy* ~~es~~ *thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein.*

*Sworn to before me, this* **10th** *day of* **March** *19*75

Victor Ortega

VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975